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NO. 84-797 (3)

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

HENRY J. BENNETT, JR.

PETITIONER

VERSUS

CITY OF SLIDELL, GERRY E. HINTON, B. E. McDANIEL, NUNZIO GIORDANO, and PATRICK J. BERRIGAN

RESPONDENTS

and

FRANK M. CUSIMANO, KEITH S. INGRAM, and CENTRAL LOUISIANA ELECTRIC COMPANY

DEFENDANTS

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit properly interpreted and applied *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978).

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---

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

Respondents, the City of Slidell, Gerry E. Hinton, B. E. McDaniel, Nunzio Giordano, and Patrick J. Berrigan,

oppose the petition for writ of certiorari filed herein by Henry J. Bennett, Jr.

## STATEMENT OF THE CASE

In mid-1975, plaintiff, Henry J. Bennett, Jr., leased, with an option to buy, certain premises at 3745 Pontchartrain Drive in Slidell. Transcript-117,231,307. Bennett, previously having operated Fooser's Den, planned to open a new lounge, the Club Rustique.

One day in early June of 1975, John Coerver, who owned property next to 3745 Pontchartrain Drive, T-222, and who was the Slidell city auditor, T-241, walked into plaintiff's premises and, in the presence of several witnesses, told plaintiff not to spend any more money remodeling because he, Coerver, didn't want plaintiff to open for business. T-167. Coerver stated he would do everything he could to prevent the opening and that plaintiff didn't have a prayer because of his, Coerver's, political influence. T-120,167-8,194,253,309.

Despite Coerver's warning on June 11, 1975, Bennett applied to Bill Dugas, the Slidell building inspector, for a building permit. The permit was issued on June 18, 1975. T-393. According to Dugas, standard procedure was for a certificate of occupancy to be both applied and paid for when a building permit was issued. The occupancy permit would then be held until final inspection, when he would sign and issue the certificate. T-380.

On July 7, 1975, Bennett submitted a notarized application for a liquor license. T-312. After routine procedures, Berrigan, the City Attorney, initialed the application and forwarded it to John Swenson, the Slidell city

clerk, who caused an ordinance proposing granting the liquor license to be brought before the City Council. T-79-80.

Prior to the City Council's taking up consideration of Bennett's liquor license on August 12, 1975, John Coerver had, on July 24, 1975, written the council a letter objecting to the license being issued. Coerver, apparently claiming to speak for all property owners near 3745 Pontchartrain Drive, stated:

> "Our objections are based on the fact that the property in question measures only thirty (30) feet wide by a depth of approximately two hundred forty-four (244) feet. There is a ten (10) foot easement between the Lakeside Building and the proposed establishment, and this is the only access available to any possible parking space available in the rear of the building. Please bear in mind that this easement allows only for one way traffic because of the size, and must be open at all times. In the front of this building there is space for approximately four (4) automobiles and that is all. We would also like to point out that based upon plans of the Highway Department construction along Pontchartrain Drive, there will be controlled access to properties and according to these plans there will be one access available to the Lakeside Building and the proposed location along the previous mentioned perpetual easement."

Thus, at the August 12, 1975, council meeting, the issue was first raised, T-276,285, as to whether a liquor license might be issued before an occupancy permit. T-39-40, 271-2, 284.

At the August 12, 1975 council meeting, Councilmen

Hinton and McDaniel moved "that a clarification of procedure should be obtained from the City Attorney's office whether a liquor permit may be approved before the City's Certificate of Occupancy is secured." The motion failed by a two to two vote and a subsequent vote on the ordinance which would have granted the liquor license was defeated three to one by the votes of Hinton, McDaniel and Giordano. Minutes of August 12, 1975, City Council meeting, T-216-217, 218-219, 284.

On August 21, 1975, Coerver again wrote the council, this time objecting to issuing an occupancy permit to Bennett unless Bennett first satisfied the paving requirements of Slidell's Zoning Ordinance which required in part that

> "Such parking space shall be surfaced with a minimum of four inches of concrete or similar all-weather surface and such entrances shall be similarly surfaced." Slidell Zoning Ord. No. 795, Sec. 4.1.

It is not clear why Coerver wrote the Council because, barring an appeal to the board of zoning adjustments or to the city council, T-298-9,423, neither of which was taken by Bennett, Dugas, as building inspector, was the employee who issued occupancy permits. T-100-101,272,422-3.

On August 22, 1975, ten days after the council first considered Bennett's application, a special meeting was scheduled, apparently to grant Bennett's liquor license, T-89-90, it having been resolved that an occupancy permit was not a prerequisite for a liquor license. T-284,295-6. When the August 22, 1975 meeting commenced, councilman Hinton was served with a mandamus suit, T-295-6, filed on behalf of Bennett and seeking to compel issuance

of the liquor license. T-149-50. Not being certain of what to do, the August 22 meeting was adjourned. T-295-6. After consulting with the city attorney, Berrigan, Bennett's application was again set for hearing at the next meeting, September 23, 1975, at which time the liquor license was unanimously approved. T-296.

Despite securing the liquor license, Bennett was unable to open for business since he did not have an occupancy permit, Bill Dugas having refused to sign same.

According to Dugas, while Slidell Zoning Ord. No. 795 required paving of certain parking areas, he, Dugas, had chosen to let some establishments operate without paving. T-380-1.

> "Now, the City Ordinance demands blacktop or paving for parking areas. Everyone can't afford paving, so they use blacktopping. Now, I used my own judgment in a number of cases around Slidell, and a lot of them used shells. I didn't contact the City Attorney or the City Council. I used my own common sense to allow people to put shells." Testimony of Bill Dugas, T-381.

Dugas apparently at one time told Bennett, who was short of cash, that shells could be used rather than paving, at least for a time. T-320,382. Bennett then purchased shells and put them down. T-319. After Coerver approached Dugas, however, and threatened to sue if Ord. 795 were not strictly enforced, T-223,250,382, Dugas required Bennett to expend additional funds and pave the parking lot of the Club Rustique, prior to issuing the occupancy permit. T-321, 382.

In addition to enforcing the paving ordinance, Dugas elected to enforce provisions relating to a temporary electrical permit issued to Bennett for construction purposes only.

John Coerver, at some point in 1975, took photographs of the Club Rustique and gave them to Dugas. Coerver had called CLECO and, on learning that the electrical permit granted Bennett was for construction only, told Dugas that Bennett was going to have a party and that business was going on in violation of the temporary and conditional electrical permit. T-245-7.

Dugas testified that one of his inspectors saw "a lot of cars there one night" at the Club Rustique and found beer cans and liquor bottles there the next day. T-385. Without personally verifying the reports about Bennett, but apparently relying on Coerver's word and both the initial and a subsequent inspection, T-410, of Bennett's premises, Dugas telephoned Howard Levy at CLECO and stated "I want to cut off the electricity at Henry Bennett's place." T-386. After consulting with Berrigan, Dugas, on November 14, 1975, sent a letter to CLECO requesting power to Bennett be disconnected. T-415-16. When informed by CLECO that instructions to turn off Bennett's electricity had to come from one stronger than Dugas, Dugas referred the matter to Berrigan, who, relying on facts presented to him by Dugas, on November 19, 1975, wrote CLECO a letter authorizing the disconnection. T-47,386. Bennett's electricity was off for a week from November 19, 1975. T-326.

After meeting the paving requirement, Bennett's occupanncy permit was issued on November 26, 1975. T-330-2; answer of City of Slidell to Interrogatory No. 12.

Bennett subsequently brought suit against the City of Slidell, Patrick J. Berrigan, the Slidell City Attorney, Gerry E. Hinton, Nunzio Giordano, and B. E. McDaniel, members of the Slidell City Council, Frank Cusimano, the Mayor of Slidell, Keith S. Ingram, the Chief Administrative Officer of Slidell, and Central Louisiana Electric Company (CLECO), under 42 U.S.C. 1983 and 42 U.S.C. 1985. Bennett sought damages for the delays he had experienced in securing both the liquor license and certificate of occupancy, each of which was needed before Bennett's lounge, the Club Rustique, could have been opened.

Prior to trial, CLECO was voluntarily dismissed as a defendant.

At trial, the court dismissed plaintiff's 1985 claim but, regarding the 1983 claim, refused to grant directed verdicts in any of the defenants' favor. The jury returned verdicts in favor of Frank Cusimano and Keith S. Ingram, against the City of Slidell for $20,000, and against Patrick J. Berrigan, Gerry E. Hinton, B. E. McDaniel and Nunzio Giordano for $1,000 each. 518 F.Supp. 59 (E.D.La. 1981).

Each of the defendants cast in judgment appealed to the United States Court of Appeals for the Fifth Circuit. On February 7, 1983, the Fifth Circuit affirmed as to the City of Slidell and Berrigan but reversed as to Hinton, McDaniel and Giordano. 697 F.2d 657 (5th Cir. 1983). Berrigan sought, and, on May 23, 1983, was granted a rehearing en banc. 706 F.2d 533 (5th Cir. 1983).

Under Fifth Circuit Local Rule 17, the effect of granting a rehearing en banc was to vacate the previous opinion. Hence, the appeals of Slidell, Berrigan, Hinton, McDaniel and Giordano was again before the court. In

addition to granting the rehearing en banc, the Fifth Circuit posed a number of questions specifically directed to counsel in *Webster v. City of Houston,* 689 F.2d 1220, *rehearing en banc granted* 711 F.2d 35, *on rehearing en banc* 735 F.2d 838, *on rehearing en banc* 739 F.2d 993 (5th Cir. 1984), at that time consolidated with this case for purposes of en banc consideration by the Fifth Circuit, but central also to the questions raised in *Bennett.* Those questions were as follows:

> "If the municipal liability is predicated on the action of a city official:
>
> (1) By what standards is the court to determine which city officials' actions, inactions, or sanctions of the action of others, can constitute city custom, usage, or policy?
>
> (2) By what standards is the court to determine whether the actions or a city official constitute city custom, usage, or policy such as to subject the city to liability?
>
> (3) What continuity or persistency of actions must a plaintiff show in order to bear the burden of proof that the actions constituted the city's custom, usage, or policy?
>
> (4) When the court admits evidence of actions that did not themselves violate constitutional rights as circumstantial evidence that the city had a custom, usage or policy of violating constitutional rights [see Jury Charge, R. Vol. 8, p. 16, lines 10-24], should the court apply the same or different standards to the 'evidentiary action' as it would to direct evidence of actions which violate constitutional rights?

If municipal liability is predicated on a decision of a city official, rather than an action of the official:

(1) By what standard is the court to determine whether the decisions of a city official constitute city policy?

(2) By what standards is the court to determine those city officials whose decisions can constitute city policy?

(3) If decisions become city policy by custom or usage, what continuity or consistency of decisions must a plaintiff show in order to bear the burden of proof that the decisions constituted policy, custom, or usage of the city?"

Excepting question 4, an evidentiary matter relating to *Webster* only, all of the questions posed related directly to issues present in *Bennett.*

In a carefully written opinion issued April 2, 1984, the Fifth Circuit en banc reinstated the original panel's decision except that the City of Slidell was found not to be liable under *Monell.* 728 F.2d 762 (5th Cir. 1984).

Bennett petitioned the Fifth Circuit for rehearing and, in a terse opinion issued July 9, 1984, all thirteen judges, with five judges dissenting only as to their interpretation of the facts, reaffirmed their original en banc opinion as to the law. 735 F.2d 861 (5th Cir. 1984). Bennett subsequently petitioned this Court for a writ of certiorari.

## SUMMARY OF ARGUMENT

The law, as set forth in *Monell* and the subsequent jurisprudence, and as unanimously construed by the en banc Fifth Circuit Court of Appeals, in light of the facts of this case, denies petitioner Bennett any recovery from the City of Slidell. The Fifth Circuit's two en banc decisions so holding were absolutely correct and should remain undisturbed. For these reasons, petitioner's application for a writ of certiorari should be denied.

## ARGUMENT IN OPPOSITION TO GRANTING THE WRIT OF CERTIORARI

In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978), this Court held that municipalities might be subjected to suits for monetary damages as well as declaratory and injunctive relief under 42 U.S.C. 1983. Municipalities were not to be held liable under the theory of respondeat superior but only when execution of the municipalities' policy or custom caused the harm. The question of precisely what constituted policy or custom was not answered in *Monell*.

Numerous attempts have been made to delineate the vague contours of *Monell*. *Burt v. Abel*, 585 F.2d 613 (4th Cir. 1978), held that under *Monell*, a 1983 claim could be grounded on "an official action of that municipality," rather than on a policy or custom. In *Turpin v. Mailet*, 619 F.2d 196 (2d Cir. 1980, *cert. denied* 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980), the court stated that a policy of acquiescence in illegal conduct could not ordinarily be inferred from a single incident of illegality. In *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), the Fifth

Circuit held that in those areas in which an official is the final authority, his official conduct and decisions must necessarily be considered to represent official policy.

In *Bennett,* the plaintiff was found to have been injured by the acts of the City Attorney, Patrick J. Berrigan, and the Slidell building inspector, Bill Dugas. After a careful analysis of just what can constitute policy or custom, those official acts were found not to so constitute policy or custom and, therefore, not to subject the City of Slidell to Monellian liability.

Petitioners' application for writ of certiorari is, it is believed, grounded on one basic division of opinion as to the law. Petitioners' view is, apparently, that each and every municipal officer, regardless of rank or the degree of decisionmaking authority to which he is entrusted, is, simply by virtue of carrying out the duties of his position, deciding policy. That view, espoused by Schnapper in *Civil Rights Litigation after Monell,* 79 Col. L.R. 213 (1979), and apparently adopted by the original Fifth Circuit panel in the present case, 697 F.2d 657 (1983), would essentially result in a respondeat superior liability situation for municipalities, *Monell* to be contrary notwithstanding.

Almost all municipal officers have the opportunity to make at least some decisions and to perform some acts. Almost all officers have the opportunity, in carrying out their responsibilities, to make isolated decisions and perform single acts which are wholly illegal and violative of the constitutional rights of others. Respondent does not believe that this Court, in deciding *Monell,* intended that municipalities should be subjected to liability for the consequences of such aberrant acts.

Respondents believe that the en banc Fifth Circuit, in deciding the present case, properly analyzed the meaning of policy and custom in light of *Monell* and the prior jurisprudence and correctly concluded that, since neither the City Attorney nor the building inspector were specifically delegated any policymaking authority, and since the harm inflicted was in no way a persistent practice of unequal application of the law, the City of Slidell should not be held liable. In rejecting the view of both Schnapper and the original Fifth Circuit panel, the en banc Fifth Circuit noted that

> "policymaking authority is more than discretion, and it is far more than the final say-so, as a matter of practice, on what water main will be replaced today and whether a building meets city construction standards. City policy makers not only govern conduct; they decide the goals for a particular city function and devise the means of achieving those goals. Policymakers act in the place of the governing body in the area of their responsibility; they are not supervised except as to the totality of their performance. The governing body retains the prerogative of the purse and final legal control by which it may limit or revoke the authority of the official. The relinquishment of policymaking and supervision by the governing body is much more likely to exist, and be necessary, as the size and complexity of the government increases." 728 F.2d 762 at 769.

*Bennett* essentially stands for the proposition that municipalities may not be held liable for the 1983 wrongs of municipal officials so long as the acts committed are not part of a persistent pattern but are isolated incidents. The decision in no way conflicts with *Monell* and, in fact, is the most thorough and careful analysis of what acts will and

will not subject a municipality to Monellian liability since this Court handed down *Monell* in 1978. To the extent that past decisions of other circuit courts of appeal may seem to have differed from *Bennett,* it is suggested that those decisions were based upon different facts and were not contrary interpretations of the law. Nevertheless, should this Court see fit to grant petitioners' writ of certiorari, it is urged that the decision below was fully consonant with *Monell* and should be affirmed.

In supplemental brief to the Fifth Circuit Court of Appeals en banc, respondent City of Slidell urged that, under *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981), petitioner did not, as to the city, state a cause of action under 42 U.S.C. 1983. In issuing its en banc opinions, the Fifth Circuit did not address respondent's Parrattian argument. In opposing petitioners' application for a writ of certiorari, respondents again urge that, under *Parratt* and the subsequent jurisprudence, Bennett is simply not entitled to a 1983 cause of action and, hence, his suit should be dismissed for failure to state a claim upon which relief can be granted.

## CONCLUSION

Petitioner Bennett's suit should be dismissed for failure to state a claim upon which relief can be granted.

Alternatively, the Fifth Circuit's two en banc decisions correctly analyzed both the law and the facts in light thereof and should remain intact. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the above and foregoing Opposition to Petition for Writ of Certiorari have been served upon David W. Oestreicher, II, Oestreicher, Whalen & Hackett, 307 Exchange Alley, New Orleans, Louisiana 70130, counsel for petitioner, Henry J. Bennett, Jr., by placing same in the United States mail, postage prepaid, this 20 day of February, 1985.

FRANK M. REPASS III